Supreme Court, U.S.
FILED

Case No 941460 FEB 28 1995

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

October 1994 Term

ROBERT CULP,
Petitioner

v

WISMER & BECKER, MICHIGAN BOILER & ENGINEERING CO. AND CONTINENTAL INSURANCE CO., THE SECOND INJURY FUND, DEARBORN FABRICATING CO. AND AETNA CASUALTY & SURETY CO., MILLWRIGHT SERVICES, INC. AND MICHIGAN STATE ACCIDENT FUND, STANDARD ALLIANCE AND CNA INSURANCE CO., CENTURY 21 AND TRAVELERS INSURANCE CO. , COMMERCIAL CONTRACTING AND SEABOARD FIRE & MARINE INSURANCE CO., FOSTER WHEELER CORP. AND HARTFORD INSURANCE CO., R. G. BEER CORP. AND OHIO FARMERS INSURANCE CO., PHILRAY CORP. AND SENTRY INSURANCE CO., GALLAGHER-KAISER CORP. AND HARTFORD INSURANCE CO., CONVEYOR ENGINEERING CO. AND ROYAL INSURANCE CO. , ALLIED STEEL CONVEYOR CO. AND AMERICAN MOTORISTS INSURANCE CO., MICHIGAN BOILER AND ZURICH INSURANCE CO., MILLWRIGHT SERVICES GREAT AMERICAN INSURANCE CO., SPARTAN RAILWAY EQUIPMENT CO. AND WAUSAU INSURANCE CO., MHE CONTRACTING, INC. A/K/A RAPISTAN, INC. AND MICHIGAN MUTUAL INSURANCE CO.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO

THE MICHIGAN SUPREME COURT

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Questions Presented

Whether Petitioner was denied a meaningful petition for a redress of grievances to the Michigan courts when his application for leave to appeal to the Michigan Court of Appeals was granted, but only for issues that were not a part of Petitioner's grieveances, not a part of any contentions made by the Petitioner or any other litigant in the administrative proceedings and not an issue raised by the proofs presented in the administrative proceedings, but were a part of a secret agenda of the Michigan Court of Appeals that sought to undermine established precepts of Michigan workers' disability compensation law by the issuance of peremptory, unpublished, erroneous decisions contrary to Court Rules determining when Court of Appeals decisions should be published; such agenda appreciably reducing workers compensation disability benefits?

Whether petitioner was denied freedom of expression as guaranteed by the First Amendment

to the Constitution of the United States when he sought to present written arguments to the Michigan Court of Appeals concerning his real grievances and sought on oral argument to persuade the Michigan Court of Appeals to consider arguments regarding his real grievances but these attempts at argument were thwarted by decisions of the Michigan Court of Appeals?

Whether Petitioner was denied equal protection of the law and due process of law when his judicial review before the Michigan Court of Appeals was limited to arguments unrelated to his real grievances, but litigants opposed to his interests were allowed a full right judicial review?

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WISMER & BECKER, MICHIGAN BOILER & ENGINEERING CO. AND CONTINENTAL INSURANCE CO., THE SECOND INJURY FUND, DEARBORN FABRICATING CO. AND AETNA CASUALTY & SURETY CO., MILLWRIGHT SERVICES, INC. AND MICHIGAN STATE ACCIDENT FUND, STANDARD ALLIANCE AND CNA INSURANCE CO., CENTURY 21 AND TRAVELERS INSURANCE CO., COMMERCIAL CONTRACTING AND SEABOARD FIRE & MARINE INSURANCE CO., FOSTER WHEELER CORP. AND HARTFORD INSURANCE CO., R. G. BEER CORP. AND OHIO FARMERS INSURANCE CO., GALLAGHER-KAISER CORP. AND HARTFORD INSURANCE GROUP., CONVEYOR ENGINEERING CO. AND ROYAL INSURANCE CO., ALLIED STEEL CONVEYOR CO. AND AMERICAN MOTORISTS INSURANCE CO.., MICHIGAN BOILER AND ZURICH INSURANCE CO., MILLWRIGHT SERVICES AND GREAT AMERICAN INSURANCE CO., SPARTAN RAILWAY EQUIPMENT CO. AND WAUSAU INSURANCE CO., MHE CONTRACTING INC. A/K/A RAPISTAN, INC. AND MICHIGAN MUTUAL INSURANCE CO.
Respondents. /

PETITION FOR A WRIT OF CERTIORARI

TO THE MICHIGAN SUPREME COURT

Petitioner, ROBERT CULP, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Michigan Court of Appeals of May 19, 1994, leave to appeal to the Michigan Supreme Court denied November 30, 1994.

ADDITIONAL PARTIES TO THE PROCEEDING

Employers Mutual Insurance Co. of Wausau is the insurer of Defendant Wismer & Becker and its name does not appear in the caption.

OPINIONS BELOW

The opinions below are the Opinions of the Michigan Workers' Compensation Appeal Board and the unpublished Opinion of the Michigan Court of Appeals issued May 19, 1994, leave to appeal to the Michigan Supreme Court was denied November 30, 1994.

JURISDICTION

This is a workers disability compensation case in which the Petitioner established conclusively that he was entitled to permanent and total disability benefits because of loss of industrial use of the legs. The final administrative determination was that he was partially disabled. Leave to appeal was sought from the Michigan Court of Appeals seeking to establish error in the finding of partial disability. Leave to appeal was granted, but

limited to consideration of how partial disability benefits were calculated and when they should commence. Petitioner sought to have the Michigan Court of Appeals consider his real grievances rather than the issues limited by the Court of Appeals grant of leave to appeal, which were unrelated to Petitioner's grievances, were not a contention of any of the litigants and were not a proper consideration in accord with the evidence presented in the administrative proceedings. The Court of Appeals would not consider Petitioner's real grievances and affirmed the administrative determination of partial disability by an unpublished opinion issued May 19, 1994. Petitioner sought leave to appeal to the Michigan Supreme Court which was denied on November 30, 1994.

Jurisdiction of this Court is provided by Title 28, Section 1257 of the United States Code.

THE CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I, Constitution of the United States.

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.

Amendment V, Constitution of the United States.

> No person shall . . . be deprived of life, liberty or property without due process of law.

Amendment XIV, Constitution of the United States.

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, libery or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

This is a workers' disability compensation case where, in compensation administrative proceedings, Petitioner conclusively established his entitlement to benefits provided for a disability spelled out in Michigan statutory law, Workers' Disability Compensation Act, Section 361 (2) (g); MCLA 418.361 (2) (g) as permanent and total disability because of loss of industrial use of both legs, but received a final administrative determination of an unspecified amount of partial disability benefits, Workers' Disability Compensation Act, Section 361 (1); MCLA 418.361 (1). The foregoing requires some explanation of Michigan Workers' Disability Compensation law before these statements of conclusion can be accepted.

The only pertinent medical testimony came from a medical expert retained by an employer of the Petitioner. This testimony was that because of a fall at work of twenty-five feet

to a concrete floor and strenuous work as a millwright following recuperation from the fall, Petitioner had no useful function of his lower limbs. (Deposition of Dr. Horvath, pp 16-20). If this testimony is uncontradicted, it established loss of industrial use of the legs permanent and total disability, conclusively, DeGeer v DeGeer Farm Equipment co., 391 Mich 76 (1971); Burke v Ontonagon Road Commission, 391 Mich 103 (1971). There was only one other physician who testified when all parties and all issues, particularly the issue of permanent and total disability, were before the appropriate compensation administrative agency. This was a witness presented by the Second Injury Fund, an entity that has an obligation to the Petitioner only if he has a permanent and total disability, Workers' Disability Compensation Act, Section 521; MCLA 418.521. This witness concluded that Petitioner had disabilities that:

> . . . would constitute total, permanent and progressive disability that would make him unfit for even sedentary or wheel chair

assisted vocational employment. (Deposition of Dr. Campbell, p. 11).

Such testimony, in terms of the physical limitations of the disability is equally as conclusive as that of Dr. Horvath, but, as to cause, Dr. Campbell was of the opinion that the cause of disability was not work related but was due to peripheral neuritis and arteriosclerosis that was due to alcoholism and hypertensive cardiovascular disease. However, the significant portion of Dr. Campbell's testimony, that makes the testimony of Dr. Horvath conclusive, is that Dr. Campbell believed that cause of the disability he found all occurred in 1980 and after (Deposition of Dr. Campbell, pp 10-14). Non-work causes that occur after work caused disability has been established are of no consequence, Lynch v Briggs Mfg. Co., 329 Mich 168 (1950); Powell v Casco Nelmor Corp., 406 Mich 332 (1979). The work caused permanent and total disability of the Petitioner was established as being existent and continuing in September of 1977. Whatever non-work cause that could be a factor

in disability after that is of no consequence.

The Workers' Compensation Appeal Board, in a 2-1 decision, inexplicably, found Petitioner to be only partially disabled. The dissenting member of the panel found Petitioner to be permanently and totally disabled (Workers' Compensation Appeal Board Opinion of December 23, 1991).

Petitioner sought leave to appeal from the MIchigan Court of Appeals from the inexplicable decision of the Workers' Compensation Appeal Board of December 23, 1991, but his grievance that he had established permanent and total disability conclusively was ignored by the Court of Appeals and he was granted a judicial review limited to contending how partial disability benefits were calculated and when such benefits were to commence. (Court of Appeals Order of September 15, 1992). Petitioner then sought a by-pass application for leave to appeal from the Michigan Supreme Court which was denied (Supreme Court Order of

January 20, 1993). A reconsideration of this decision was sought, seeking only to be allowed to have the same review in the Court of Appeals that Wismer & Becker would have; the Michigan Supreme Court having directed Wismer & Becker's application for leave to appeal to it, following Court of Appeals denial of application for leave to appeal, to be remanded to the Court of Appeals for a full review (Supreme Court Order of January 26, 1993). Reconsideration was denied (Supreme Court Order of March 29, 1993).

The Court of Appeals then ordered the judicial reviews of Petitioner and Wismer & Becker be consolidated (Order of the Court of Appeals of June 11, 1993). Petitioner filed briefs in the consolidated matters which argued Petitioner's real grievances and the Second Injury Fund moved, in each instance, to strike arguments beyond the scope of the Court of Appeals grant to the Petitioner on his application for leave to appeal. In each

instance the Court of Appeals struck Petitioner's arguments regarding his real grievances (Court of Appeals Orders of February 11, 1993 and September 1, 1993). In the second of these motions to strike, the Second Injury Fund also sought to be dismissed from the consolidated judicial reviews. In opposing the second of these motions to strike, Petitioner challenged the relief sought by claiming equal protection of the law rights under the Fourteenth Amendment to the Constitution of the United States (Brief in Opposition to Motion to Strike and for Dismissal, pp 7-9). By order of the Chief Judge of the Court of Appeals, the second brief of the Petitioner was stricken, but the order was silent as to dismissal of the Second Injury Fund (Order of the Court of Appeals of September 1, 1993).

When the consolidated matters were called for oral argument on January 11, 1994, Petitioner's counsel limited his opening argument to Constitutional issues that provisions of the First, Fifth and Fourteenth

Amendments to the Constitution of the United States required that he be allowed to present contentions regarding the real grievances of the Petitioner. The panel of the Court of Appeals refused to allow arguments as to the real grievances of the Petitioner and the consolidated reviews were then submitted to the Michigan Court of Appeals for decision.

Promptly after the oral arguments in the Michigan Court of Appeals, Petitioner brought a 42 USC 1983 action against the judges of the Court of Appeals assigned to consider the judicial reviews of Wismer & Becker and the Petitioner. This matter was brought in the United States District Court for the Eastern District of Michigan, Case No 94 CV 60018. It sought declaratory and injunctive relief based upon claims that the Michigan Court of Appeals judges limited the federal rights of the Petitioner to have a meaningful access to the courts for a redress of grievances and denied him the rights of free expression, due process of law and equal protection of the law as

provided by the First, Fifth and Fourteenth Amendments to the Constitution of the United States. It was further claimed that he was denied these rights because of Michigan Court of Appeals action to promote a secret agenda of that court that sought by peremptory, unpublished orders, issued contrary to Court Rules promulgated by the Michigan Supreme Court to insure that there be public disclosure of the law making function of the Michigan Court of Appeals, to undermine established precepts of Workers Disability Compensation law so as to appreciably reduce workers disability compensation weekly benefits. The District Court denied injunctive relief and granted a motion to dismiss and for summary judgment for the judges of the MIchigan Court of Appeals who were the Defendants in this action on the bases that there was absolute judical immunity and that Petitioner had no rights because Michigan law provided only for leave to appeal from final workers' disability compensation administrative decisions so no rights of Petitioner could be violated. This matter is

presently pending appeal in the Sixth Circuit Court of Appeals, Case No. 94 2334.

On May 19, 1994 the Michigan Court of Appeals issued an unpublished decision which did not address any of Petitioner's real grievances and affirmed the decision of the Workers' Compensation Appeal Board (Court of Appeals Opinion of May 19, 1994). Petitioner then sought leave to appeal from the Michigan Supreme Court raising the issues that Petitioner had been denied a meaningful access to the Michigan courts for a redress of grievances; that in allowing him judicial review, the Michigan Court of Appeals also denied him freedom of expression, equal protection of the law and due process of law in furtherance of its agenda to undermine established precepts of workers' disability compensation law to appreciably reduce workers' disability compensation weekly benefits (Application for Leave to Appeal and Brief in Support of Application for Leave to Appeal filed June 7, 1994).

Leave to appeal was denied November 30, 1994. Petitioner now brings this proceeding seeking a writ of certiorari directed to the Michigan Supreme Court.

ARGUMENT

PETITIONER WAS DENIED A MEANINGFUL ACCESS TO MICHIGAN COURTS, FREEDOM OF EXPRESSION, DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW WHEN HIS APPLICATION FOR LEAVE TO APPEAL TO THE MICHIGAN COURT OF APPEALS WAS CONVERTED BY THAT COURT TO ITS PURPOSE, AN AGENDA TO UNDERMINE ESTABLISHED PRECEPTS OF WORKERS' DISABILITY COMPENSATION LAW, BY ERRONEOUS, UNPUBLISHED, PEREMPTORY DECISIONS, ISSUED CONTRARY TO MICHIGAN COURT RULES DESIGNED TO PROMOTE PUBLIC KNOWLEDGE OF THE LAW MAKING FUNCTION OF THE MICHIGAN COURT OF APPEALS FOR THE PURPOSE OF APPRECIABLY REDUCING DISABILITY WEEKLY BENEFITS.

The Michigan Supreme Court was well aware of the agenda of the Michigan Court of Appeals that applied erroneous law by peremptory unpublished decision contrary to Court Rules promulgated by the Michigan Supreme Court to give public knowledge to decisions of the Michigan Court of Appeals that revealed that court's law making function, Michigan Court Rules of 1985, Rule 7.215 (B); MCR 7.215 (B). When Petitoner sought his by-pass application for leave to appeal to the Michigan Supreme Court, following the Court of Appeals grant of limited review to him, this seeking of Supreme Court judicial review was opposed by Wismer & Becker by submission of ten unpublished decisions of the Court of Appeals, nine of which were peremptory and the tenth of which was at length, but followed an order of the Michigan Supreme Court that the Court of Appeals issue a plenary opinion and allow amicus curiae briefs. The unpublished decisions were submitted to the Supreme Court in support of an argument attempting to show that these unpublished opinions established a

rule of law that Petitioner was only partially disabled.

The single at length decision was in a case where the Court of Appeals, in 1986, had issued an unpublished, peremptory decision directing that partial disability benefits be calculated in accord with two Michigan Supreme Court cases of the 1920's that had not been followed in more than sixty years. The single at length decision was, at the time of submission of the application for leave to appeal, here, from the denial of which we seek certiorari, a part of the record in Sobotka v Chrysler Corp., 447 Mich 1, at pp 9-10 (1994). The opinions in Sobotka, reveal that the agenda of the Court of Appeals was in operation from 1986, when the Court of Appeals by an unpublished peremptory order in an employer's seeking of leave to appeal from the Court of Appeals, directed a remand to the Workers' Compensation Appeal Board for a calculation of partial disability benefits on the basis of "physical impairment"

rather than "wage loss", the long accepted and regularly applied standard for determining weekly benefits in Michigan for partial disability, by citing Trask v Modern Pattern & Machine Co. 222 Mich 692 (1923) and Thayer v Britz, 234 Mich 645 (1927). The error in Court of Appeals citing of Trask and Thayer is evidenced by the determining opinions in Sobotka, supra, at pp 29-30 and 38-39. The opinion of Boyle, J. found the authority of Trask to be "ashes" and the opinion of Levin, J. agreed and that both Trask and Thayer ". . . ceased long ago to have any precedential force.". Justice Boyle made flat out statement that: "In Michigan, disability is wage loss." Sobotka, supra, at p 6.

While the record in Sobotka, supra, p 10, showed, in that case, the Court of Appeals agenda was in existence in 1986, the Michigan Supreme Court could not determine the time of origin, relating that ". . . provenance is in all events, unclear." Sobotka, supra, at p 9.

The breadth of the influence of the Court of Appeals agenda is significant. It can be measured, at least in part, by the fact that while the MIchigan Supreme Court considered Sobotka, supra, it ordered fourteen cases with the same single issue as Sobotka, supra, held in abeyance for action on applications for leave to appeal (Appendix p 1a). These cases did not include the case at bar, which also pended during time when Sobotka, supra, was under consideration.

The method of using unpublished, peremptory decisions is patently contrary to Michigan Court Rules of 1985, Rule 215 (B); MCR 7.215 (B) that spell out six instances where a published opinion is required, and, arguably, the Court of Appeals agenda fits all six. It is, thus, established that the agenda used erroneous law, in unpublished, peremptory decisions that were issued contrary to Court Rule. In these proceedings and the proceeding in federal court, we have challenged our opposition to show any scenario that would

reveal a legitimate judicial purpose. The challenge is yet to be met. It has never drawn a response.

It is axiomatic that Petitioner's right to petition the government for a redress of grievances is a right personal to him and is not transferred to a government agency by its exercise to empower a government agency to ukase.

Equally, it is evident that a petition to the government for a redress of grievances must be meaningful. In United Transportation Union v State Bar of Michigan, 401 U. S. 576, 91 S Ct. 1076, 8 L Ed 2d 339 (1971) it was, at pp 585-586, established:

> In the context of this case we deal with a cooperative union of workers seeking to assist its members in effectively asserting claims under the FELA. But the principle here involved is the basic right to group legal action, a right first asserted in this Court by an association of Negroes seeking

> the protection of freedoms guaranteed by the Constitution. The common thread running through our decisions is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation. That was the holding in United Mine Workers, Trainmen, and NAACP v Button. The injunction in the present case cannot stand in the face of these prior decisions. (Emphasis supplied).

The Michigan Court of Appeals confiscation of Petitioner's right to a meaningful access to the courts for a redress of grievances is more absurd than a hollow promise of a Constitutional freedom for by its taking it forces the one with the right to participate in

a process where there can be no benefits, only continuing, exacerbated depravations because the agency that confiscated the right knew at the taking that there would be no benefit for the one expecting Constitutional protection; the taking foretold perversion of the of the Constitutional protection.

Four times the Petitioner prayed that the Michigan Court of Appeals would recognize his right of a meaningful access to the courts. Each time he was denied that right because the Court of Appeals wanted his right to further their purpose of undermining an established legal precept in order to erroneously seek to appreciably reduce workers' disability compensation benefits. Why a majority of a panel of the Workers' Compensation Appeal Board came to its inexplicable decision, unless it was aware of the Court of Appeals agenda and wished to join, is difficult to fathom. But Petitioner has established a conclusive entitlement to the benefits of one permanently and totally disabled; spent nine years in

administrative litigation and came up with significantly less than his entitlement. His grievance was evident and deserving of consideration. The treatment given his right to petition more than stripped all significance from what the Constitution promises. A mockery was made of his birthright by those oath bound to defend it. The Michigan Supreme Court, aware of the circumstances by its dealing with other cases and its dealings with this case, denied leave to appeal, and in so doing protected a patent Constitutional depravation the Court of Appeals imposed upon the Petitioner. Such presents ample reason for issuing a writ of certiorari.

Confiscating Petitioner's Constitutional right to a meaningful petition for a redress of grievances was not the only fundamental rights iniquity imposed upon the Petitioner by the Michigan judiciary. The four pleas to the Michigan Court of Appeals to consider Peteitioner's real grievances were rebuffed.

Each plea was a request to exercise the right of free speech, a right that is not forbidden unless there is a clear and present danger. What Justice Brandies, with the concurrence of Justice Holmes, said in 1927 regarding limitations on free speech is fully applicable today:

> Those who won our independence by revolutions were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an

> emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is, therefore, always open to Americans to challenge a law abridging free speech . . . by showing that there is no emergency justifying it. Whitney v California, 274 U. S. 357, 377; 47 S Ct. 584; 71 L Ed. 1095 (127), Concurring opinion of Brandies.

There was no emergency when Petitioner sought leave to appeal from the Michigan Court of Appeals on his real grievance, seeking to correct,an inexplicable final administrative determination. Yet, the Court of Appeals would only hear what it wanted to consider and limited review to what it wanted to consider. When it imposed this limitation, although there was no emergency and Court Rules allowed for the expansion of grounds for appeal on terms it deems just, Michigan Court Rule 7.216; MCR 7.216, it used that limitation to twice strike written arguments sent on behalf of Petitioner

and forbade oral presentation of Petitioner's real grievances. These four instances, there being no inkling of an emergency, were meaningful denials of free speech. The Court of Appeals was unwilling to consider a discussion of its falsehoods and fallacies. It made no attempt to avert the evil of such by the processes of education and apply the remedy of more speech. The Court of Appeals enforced silence, with the evil of its unholy, Star Chamber agenda to undermine established precepts of law being the only apparent reason.

This case was presented to the Michigan Court of Appeals in a proceeding which consolidated this judicial review with the judicial review of Wismer & Becker. Wismer & Becker, by order of the Supreme Court, had a full right to judicial review. Petitioner was limited to an issue selected for him by the Court of Appeals that was not a part of his grievance, was not an issue raised by any litigant, and not an issue appropriated to the evidence presented.

Central to Petitioner's real grievance was his need to present the testimony of Dr. Horvath to establish his permanent and total disability. Central to Wismer & Becker' need to show it had no obligation to Petitioner because permanent and total disability was established long before any employment with Wismer & Becker and nothing occurred in that employment that could possibly cause the gross limitations of the Petitioner was the testimony of Dr. Horvath. Every employer who used the services of Petitioner following the September 1977 examination of Dr. Horvath could similarly use that testimony of Dr. Horvath to exculpate itself from a compensation obligation to Petitioner. Court of Appeals limitations on speech on behalf of Petitioner were not limitations on those who opposed his claim. Such is a classic example of a denial of procedural equal protection of the law, and similarly, due process of law to the Petitioner.

CONCLUSION

A long term secret agenda of the Court of Appeals that had no judicial purpose, used erroneous law, by the vehicle of peremptory, unpublished decisions contrary to Court Rule provisions designed to give distribution of knowledge as to how the Court of Appeals is applying the law, was the evident reason the Court of Appeals appropriated Petitioner's right for a meaningful petition to the courts for a redress of grievances.

Petitioner's right to a meaningful access to the courts for a redress of grievances is recognized by the rulings of this Court as being protected by the First Amendment to the Constitution of the United States. Such a meaningful right was not protected by Michigan Courts, here. That right of the Petitioner was taken and used by the Michigan Court of Appeals for a purpose foreigh to any legitimate judicial undertaking. In the wake of such a Star Chamber activity the Petitioner's rights

of freedom of expression and a fair hearing were sacrificed to the rulers of darkness who were creating a law unto themselves. Knowing all of this, the Michigan Supreme Court declined to give consideration to such blatant depravations of fundamental rights, and by such declination, protects governmental usurpation of fundamental rights the Bill of Rights and Civil War Amendments to the Constitution were designed to protect for the People from the acts of government, both State and Federal.

When the State judiciary will not recognize its Constitutional obligation, the Supreme Court must act to make the Constitution meaningful. Here, duty calls upon this Court to grant a writ of certiorari directed to the Michigan Supreme Court.

RELIEF

WHEREFORE, Petitioner prays that a writ of certiorari issue directed to the Michigan Supreme Court.

Respectfully submitted,

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CASES HELD IN ABEYANCE IN THE MICHIGAN SUPREME COURT PENDING DECISION IN SOBOTKA v CHRYSLER CORPORATION

Case Titles	Case Numbers
Dolsen v Junction Manufacturing	97307
Magee v City of Grosse Point Park	96445
Aubert v CMI- Noran Inc.	96709
Callaghan v North Star Steel	96812
Lenartz v Packaging Company of America	98368
Bell v Chrysler Corporation	96601
Sturm v Chrysler Corporation	96340
Kennedy v Kast Heating & Cooling	96723
Lee v Driveco Inc.	96903
Monroe v Teledyne Continental Motors Corp.	96557
Warner v Ferris State College	96481
Michalak v Michalak Bros. Inc.	96553
Ott v General Motors Corp	97921
Wilk v Coca Cola	97096

The above information was obtained from a file of a member of the Michigan Workers' Disability Compensation Appellate Commission from Orders of the Michigan Supreme Court.

Excerpt from Petitoner's Brief in Support of Application for leave to Appeal to the Michigan Supreme Court, Case No. 99812-3

STATEMENT OF QUESTIONS INVOLVED

DID THE COURT OF APPEALS DENY ROBERT CULP A MEANINGFUL PETITION TO THE JUDICIARY AND DUE PROCESS OF LAW BY LIMITING THE ISSUES OF HIS CASE TO A MATTER THAT WAS NOT A PART OF HIS GRIEVANCE, BUT A PART OF A COURT OF APPEALS AGENDA SEEKING TO CHANGE THE LAW OF WORKERS' DISABILITY COMPENSATION, CONTRARY TO DECADES OF DECISIONS OF THIS COURT AND LONG STANDING ADMINISTRATIVE PRACTICE SO THAT ANY PHYSICAL FUNCTION OF AN INJURED WORKMAN REMAINING AFTER A WORK INJURY COULD BE GIVEN EARNING CAPACITY SIGNIFICANCE TO REDUCE COMPENSATION BENEFITS?

DID THE COURT OF APPEALS DENY ROBERT CULP AND HIS COUNSEL FREEDOM OF EXPRESSION AS GUARANTEED BY THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY REFUSING TO CONSIDER CULP'S GRIEVANCE AND LIMITING ARGUMENT TO AN ISSUE NOT RELATED TO HIS GRIEVANCE AND SELECTED BY THE COURT OF APPEALS?

DID THE COURT OF APPEALS DENY ROBERT CULP EQUAL PROTECTION OF THE LAW BY CONDUCTING JUDICIAL REVIEW THAT ALLOWED THOSE OPPOSED TO ROBERT CULP A FULL RIGHT OF REVIEW BUT LIMITED CULP'S RIGHT OF REVIEW TO AN ISSUE SELECTED BY THE COURT OF APPEALS NOT A PART OF CULP'S GRIEVANCE, BUT A PART OF AN AGENDA CREATED BY THE COURT OF APPEALS?

STATE OF MICHIGAN

WORKERS" COMPENSATION APPEAL BOARD

ROBERT CULP,

Plaintiff

v

WISMER & BECKER, ET AL. AND

THE SECOND INJURY FUND,

Defendants

DECISION ON REVIEW

FULLER, MEMBER OF THE ADJUNCT APPEAL BOARD, CONTROLLING

BACKGROUND

This matter comes to us on appeal from both defendants and plaintiff of the decision rendered by Administrative Law Judge Gary W. Brasseur, Mailed October 16, 1985. In his decision, Judge Brasseur nd, in pertinent part:

> Evidence does not establish a Chapter 4 occupational disease and while the 10/6/80 injury was not the only trauma experienced by this employee which resulted in his disability the application of the standard of Section 301 . . . time of injury not attributable to a single event. . . mandates

that Wismer & Becker and their carrier Employers Mutual Liability be the only liable defendants.

A description of this employee's present activities in Florida and the testimony of Dr. Robert Campbell does not establish permanent and total disabililty attributable to vocational events. This employee has other medical problems which are not traceable to employment.

Application of the two year back rule Section 381(2) limits weekly payments to a period beginning 12/10/82 (two years prior to receipt of the current petition). Earnings are shown as $826.00 based upon the employee's testimony of $20.65 per hour total package ($607.80 wages, $218.40 fringes for 40 hours) although he may have had greater earnings based upon overtime. The employee appeared to be confused regarding his last employment which he thought went to October of 1981 although the actuall.d.w. was in October of 1980.

All other defendants, including the Second Injury Fund are dismissed.

Upon our de novo review, we hereby affirm the decision below with significant modification.

LAY TESTIMONY

Trial in this matter began on March 21, 1985 with testimony of plaintiff, Robert Culp. At the time of trial, plaintiff said he had been married for approximately 35 years. Plaintiff said that they were currently living together and his wife was dependent upon him.

Plaintiff indicated that he was a retired millwright worker and had performed these duties until he retired in 1980. Plaintiff described the tools he used in this trade as a number of "precision" tools that included chain falls, come-alongs, large jacks, hydraulic jacks and a number of other types of regular tools. Plaintiff said that his personal tools were kept in a "buggy" that he brought to his various jobs. Plaintiff described his typical job duties as involving climbing, heavy lifting and generally hard labor.

Plaintiff indicated that he was a member of

the union, Local 1102 in Detroit. He referenced to an incident occurring in the summer of 1962 while working for Allied Steel at the Chrysler Jefferson Plant. Plaintiff said that he fell off some iron scaffolding some 25 feet to the ground below, while tearing down machinery. Plaintiff sustained injuries to both his legs and feet. Plaintiff was hospitalized at Henry Ford Hospital for approximately three months. Plaintiff had a steel pin put into his leg, which was taken out approximately a year later. Plaintiff was off from work as a result of this incident for 18 months.

Plaintiff returned to work for the Chrysler Corporation working as a steward. He said he performed these duties for approximately five to six weeks. Plaintiff said that he eventually returned to his regular millwright position, but was not clear on when he returned to these duties. Plaintiff testified that his leg was never the same after he injured it and he especially had problems with his left knee.

Plaintiff recalled working for M.L.E. Contractors from March 3, 1975 to July 9, 1976.

Plaintiff said he worked as a steward, millwright journeyman and took care of building conveyors, welding, burning and layout. He said he physically had to climb over the conveyors ant the work was a little hard at that time." Plaintiff said this required him to be in a number of different positions and he would have to get down on his right knee, but could not get down on his left knee.

From February 22, 1976 until April 2, 1976, plaintiff acknowledged working for Michigan Boiler, which was a "channel powerhouse." Plaintiff described his duties as being:

> . . .in charge of the rigging, pulling the chokers over and putting them on the pieces and picking them up and getting them out of the way, setting them in a position where men can clean them up and file them

Plaintiff said this position lasted for approximately five to six weeks because the job was "too rough." Plaintiff said he asked to be laid off because he "couldn't make it." Plaintiff said there were times when the fluid was so bad in his leg that it swelled up and he had to quit working.

Plaintiff said that in april of 1976, this "was the worst one of the worst times I had." Plaintiff filed a workers' compensation claim at that time and was examined by Drs. Horvath, Kelley and Newman.

During this period of time, plaintiff thought he could sell real estate and attempted to do so for Century 21 from January 7, 1977 until October 1, 1977. However, plaintiff indicated that his real estate duties involved too much walking and his legs and knee began to swell.

Plaintiff said that his legs were in "pretty good shape by a lot of resting" and so he returned to millwright work for allied Steel from October 16, 1977 until November 4, 1977. Plaintiff described this as a nice job that lasted for approximately three to four weeks. He requested a lay-off from this position after he was required to climb scaffolding, believing that he was unable to do the climbing.

'Plaintiff next worked for Structural Steel Corporation from November 21, 1977 until January 6, 1978, in a position described as a

"rack job" for General Motors. The racks were 85 feet high. Plaintiff indicated that he was unable to climb and was not required to do so.

Plaintiff's next position was with International Industrial & Construction Company, a glass manufacturing plant from January 31, 1978 until February 26, 1978. Plaintiff said that this was a "terrific job" and that he made "$1800 a week." However, plaintiff ended this position after approximately five weeks because he "couldn't make it."

Plaintiff's next position was for Townsend & Bottom from November 23, 1978 until December 22, 1978. Plaintiff was hired as a general foreman, but informed the superintendent there that he was not able to do any climbing. Although this was a high-paying job, plaintiff said that after approximately three to four weeks, he was working 14 hours a day and again" couldn't make it." He said his legs were swelling up again.

Plaintiff was next hired by Broad Crane from January 22 until July 20, 1979, for

approximately seven months as a general foreman. Plaintiff said that "they let my driver bring me right in and sit at a table. Many days, I could run the job right from that table." It was during this employment that plaintiff sustained an injury while walking down an aisle and catching his pant leg on an anchor bolt. Plaintiff twisted around sideways and fell. He injured his left knee and was treated by Dr. Kelley. Dr. Kelley aspirated plaintiff's knee and put him on crutches for a couple of days. Thereafter, plaintiff used a cane. Plaintiff returned to work, but only performed paperwork duties. Plaintiff finished his duties and worked approximately "two more weeks."

Plaintiff's next job was for Chernay Contracting Company, which was a steel mill in Monroe, Michigan from August 6, 1979 until April 4, 1980. Plaintiff worked as a steward and hired persons to work for the steel mill. Plaintiff said that Chernay was satisfied with the crew that he hired and that the superintendent "took care of me." Plaintiff

said that the superintendent indicated that he could "take it just as easy as you want to, if you come to work." Plaintiff he drove his car right along side his office and he was treated well by Chernay personnel.

Plaintiff's next position was for defendant, Wismer & Becker from July 15, 1980 until October 13, 1981. He worked as a steward and again had a desk job. In this position, plaintiff said that he "didn't touch a tool," and that his duties centered around resolving disputes between workers. Plaintiff said that he had to walk approximately a block and a half back and forth to his office to the parking lot and that this was hard on his legs. Plaintiff said that there was not a sidewalk and he would have to walk on a dirt path.

During this employment, plaintiff sustained another injury on August 6, 1980, when he took an elevator to the second floor for the purpose of conducting an on-site inspection. Plaintiff said he slipped on some piping and struck his knee against a motor. Plaintiff said his knee began to swell , was bruised and that his

superintendent sent him to the hospital when he saw plaintiff limping. Plaintiff treated with Dr. Kelley and continued to do so approximately six to eight times during the course of the next year and a half to two years. As a result of this injury, plaintiff said he did not lose any time from work, but "kept right on going."

Upon corss-examination, plaintiff acknowledge that he has been classified as a millwright since the 1950s up until he was last employed. He has received millwright wages during all of his employment duties. He also acknowledged that his particular duties changed dramatically after 1976.

In referring to his last position with the defendant Wismer & Becker, plaintiff said his left this position because of his problems getting to and from work, i.e., that block and a half walk. Plaintiff said that he could have gotten to and from his car without walking, he would have been able to function in his employment duties.

Upon continued cross-examination, plaintiff acknowledged that there are some days that he

doesn't get out of bed because of his leg pains. Plaintiff still occasionally uses a cane.

Finally, we note that the following exhibits were received below and have been review by us: CNA Exhibit 1, Commercial Contracting Exhibit 1 and Wismer & Becker Exhibit 1.

MEDICAL TESTIMONY

Paul A. Kelley, M.D., testified by deposition on behalf of plaintiff on May 26, 1983. Dr.1 Kelley is licensed practice in the state of Michigan and is also a board certified orthopedic surgeon.

Dr. Kelley firs had occasion to examine and treat plaintiff on July 19, 1979. At that time, plaintiff was 59 years old and treated with Dr. Kelley due to problems with his left knee. Plaintiffindicated that he was working as a general foreman and on June 21, 1979, he caught his left pant leg on a bolt, which caused him to twist and injure his left knee. Dr. Kelley said that plaintiff was using a cane part of the time.

X-rays of plaintiff's left knee revealed

post-traumatic changes within the knee joint, which appeared to be from an old lateral tibial plateau fracture that was developing changed secondary to that particular injury. On the date of his exam, Dr. Kelley injected plaintiff's knee with cortisone and told him to remain on his crutches or use a cane as he felt necessary. Plaintiff indicated that he had some vacation time and Dr. Kelley recommended that plaintiff stay off his feet as much as he could.

Dr. Kelley's continued treatment varied at intervals depending on how much difficulty plaintiff was having. Plaintiff was next treated by Dr. Kelley on December 3, 1979, and again in March of 1980. During his March 1980 evaluation, Dr. Kelley believed that plaintiff's knee was considerably better and he left it up to plaintiff as to when to come back for treatment.

Plaintiff was next seen by Dr. Kelley on October 7, 1980, May 1. 1981, July 21, 1981, October 12, 1981, November 10, 1981 and July 30, 1982. His condition essentially was

unchanged, but at times, he would have more difficulty that at other times.

As of July 30, 1982, Dr. Kelley recommended that plaintiff retire from work. He believed it was impossible for plaintiff to return to work in the construction field and felt that the only thing plaintiff could do would be primarily a sitting position without any walking, prolonged standing and no climbing.

In describing the relationship between plaintiff's injuries and his disability, Dr. Kelley believed that it was the result of "a combination of things." He believed that plaintiff's original fracture into his left knee joint before 1965 and then the additional incidents of strain he placed on the knee caused some changes secondary to the fracture. He believed this had a snowball effect that caused symptoms in the knee joint. He believed that Plaintiff's condition degenerated at a faster rate due to his employment duties than if he would have been sitting at a desk all of the time after his initial fracture.

J. Robert Compbell, M.D., testified by deposition for and on behalf of defendant, Second injury Fund, on March 12, 1984, in Tamp, Florida. Dr. Campbell is licensed in Florida, specializes in neurology and is board certified in Psychiatry.

Dr. Campbell had the occasion to examine plaintiff on November 3, 1983. Thereafter, he prepared a two and one-half page report dated November 8, 1983. Prior to his examination, Dr. Campbell had the opportunity to review the Petition for Hearing along with reports from Dr. Kelley, Miller and Horvath.

At the time of this exam, plaintiff complained of severe pain in both lower extremities with a particular emphasis on the left knee. Dr. Campbell noted that plaintiff's weight was approximately 248 pounds and that it was his custom to have tow or three beers a day.

His neurological exam found that plaintiff had difficulty manipulating his left knee because of the severe pain. Dr Campbell found the loss of sensibility in the lower

extremities below the knees to be distinctive. He had difficulty feeling any pulses in the plaintiff's lower extremities and plaintiff's feet were cold. Dr. Campbell found no edema in the lower extremities and there was no evidence of ascites. He could not palpate the liver due to plaintiff's tremendously obese abdomen.

Finally, Dr. Campbell concluded his report and noted the following;

1. This man has severe Hypertensive Cardiovascular Disease with associated arteriosclerotic changes particularly evident in the lower extremities.

2. He has sever Peripheral Neuritis which is most likely attributable to alcholism [sic] though Arteriocsclerosis is also relevant. A common cause of Peripheral Neuritis, Diabbetes Nellitus, has apparently been excluded by regular checkups by Dr. Stern who does treat his Hypertensive Cardiovascular Disease with medication on a daily basis (The patient could not identify the medication).

3. It is evident that this 63 year old man has progressive disability due to Hypertensive Cardiovascular Disease and Peripheral Neuritis, neither of which can be blamed on his industrial injuries and both of which interfere with his equilibrium and exercise tolerance. Even if he did not have severe Post-Traumatic Arthritis involving the left knee, I think his other medical disabilities would constitute total, permanent and progressive disability that would make him unfit for even sedentary or wheelchair sustained vocational effort.)

Dr. Campbell did not believe that plaintiff's hypertensive cardiovascular disease was a work related condition. He also believed that the peripheral neuritis could not be attributable to any trauma. He believed that plaintiff's "total disability" was attributable mostly to the progressive hardening of the arteries and peripheral neuritis because of Dr. Campbell's:

> . . .impression about this man that nasty old knee had been pretty well coped with,

that he had made the most of his capabilities up until 1980, until these other afflictions prevented him from being a champ in the sense that a champion is the man who makes the most of his capabilities,

Dr. Campbell went on to note that plaintiff:. . .did make the most of his capabilities in 1964 to 1980, and that any time in all those years the arthritic traumatic injury consequence could have been clearly defined by causal examination by any physician, and yet he kept going and made the most of his capabilities in a credible way until the hardening of the arteries and the peripheral neuritis ganged up on him in the last four years

Upon cross-examination, Dr. Campbell noted the three main causes for peripheral neuritis are diabetes, alcohol and hardening of the arteries. Dr. Campbell also stated that it

was generally thought that obesity aggravates a hardening of the arteries condition because of the greater load on the heart to pump blood to the toes.

Dr. Mark Stern, testified by deposition for and on behalf of plaintiff on March 2, 1985. Dr Stern is licensed to practice in the state of Florida and is board certified in internal medicine.

Dr. Stern first had the opportunity to treat plaintiff on March 19, 1982. At that time, Dr. Stern found plaintiff to be "somewhat overweight." His blood pressure was normal and he had a scar over his left knee. The remainder of Dr. Stern's examination was essentially normal. He diagnosed plaintiff as having hypertension and exogenous obesitySince that initial examination, Dr. Stern has treated plaintiff approximately 15 to 18 times, performing different kinds of blood tests and an electrocardiogram. His diagnosis of plaintiff's condition has not changed.

Dr. Stern did not believe that plaintiff

suffered peripheral neuropathy effecting his leg. Dr. Stern did have the opportunity to review Dr. Campbell's testimony, but he did not agree that plaintiff suffered from diabetes or the peripheral neuropathy. He agree that plaintiff suffered from hypertension. He also did not believe that plaintiff was an alcoholic.

Dr. Stern believed that plaintiff would have trouble working because of his difficulty in walking. He did not believe that plaintiff's walking problem was associated with his hypertension. He did not, however, believe that his hypertension or obesity would prevent plaintiff from returning to work.

James J.. Horvath, M.D., testified by deposition for and on behalf of defendant Wismer & Becker on March 14, 1985. Dr. Horvath is licensed to practice in the state of MIchigan and is a board certified orthopedic surgeon.

Dr. Horvath first had the opportunity to examine plaintiff on September 12, 1977. At

that time, plaintiff referenced to his injury that occurred at Chrysler Jefferson Plant where he fell and broke both of his legs and injured his left knee. Plaintiff had a scar on his left knee. On examination, Dr. Horvath found plaintiff weighing 220 pounds and having problems with his left knee. Plaintiff had a scar on his left knee and Dr. Horvath believed he had some traumatic arthritis. He believed plaintiff's arthritis would become worse and would not go away.He believe plaintiff was disabled from performing millwright duties on a permanent basis. Dr. Horvath also believed that plaintiff had a functional loss of his lower extremities. Dr. Horvath did not believe plaintiff would be able to do any climbing, carrying of materials, bending or squatting. Dr. Horvath also gave the following opinion on plaintiff's condition:

> Climbing was absolutely out of the question. Walking on uneven surfaces was out of the question. Prolonged standing any more than a few moments was out of the

question. Walking any distances, I don't believe he could have done. Possibly he could have had a job sitting in a chair and answering the telephone or doing clerical work.

Dr. Horvath also examined plaintiff on May 10, 1983. At that time,m plaintiff said his last job was with Wismer & Becker, where he worked until October of 1981, when his physician advised him to quit working. Plaintiff also referenced to an injury in 1980, where he fell and hit his left knee against a motor. Plaintiff said that for the past fiver or six years, his right knee had begun to bother him because he favored his left leg.

Upon examination, Dr. Horvath noted that plaintiff had "a rather wobbly gait" and he used a cane in his right hand to protect his left knee. There was a difference in the circumference of his left calf, thigh and knee, being a half inch less that the right. Plaintiff had a Grade I chondromalacia of the right knee and Grade II of the left. In

addition to these and other findings, Dr. Horvath believed that plaintiff had "very severe degenerative changes involving both of his knee " Dr. Horvath felt these changes were the residuals of an ancient fracture. He did not believe that there were any significant differences between his 1983 exam and the 1977 exam. He still did not believe that plaintiff would be able to perform employment as a millwright.

Finally, Dr. Horvath did not believe that the incident involving plaintiff hitting his knee against the motor at the Fermi Plant would have worsened his condition in any way. Dr. Horvath noted: "I did not feel that there was any contribution of that episode.

ANALYSIS AND DECISION

Counsel has raised a number of issues for our consideration, which are as follows:

I.

HAS PLAINTIFF ESTABLISHED THAT HE SUFFERES A TOTAL AND PERMANENT DISABILITY BASED UPON A PERMANENT AND TOTAL LOSS OF THE INDUSTRIAL USE OF HIS LEGS?

II.

WAS PLAINTIFF SUFFERING FROM A COMPENSABLE DISABILITY WHEN HE HIRED TO DO FAVORED WORK BY DEFENDANT WISMER & BECKER SO THAT THE ALLEGED AUGUST 1980 KNEE INJURY DID NOT PRECIPITATE, CONTRIBUTE, ACCELERATE OR AGGRAVATE HIS PRE-EXISTING COMPENSABLE DISABILITY?

III.

IF THE BOARD SHOULD FIND THAT PLAINTIFF IS ENTITLED TO BENEFITS, IS THE AWARD LIMITED BY APPLICATION OF THE TWO YEAR BACK RULE?

IV.

IF BENEFITS ARE AWARDED PLAINTIFF, HAS PLAINTIFF SUSTAINED HIS BURDEN OF PROVING HIS WIFE AS A [sic] DEFENDANT PURSUANT TO MCLA 418.353(1)(a)(1); MSA 17.237353)(1)(a)(1)?

The first issue for our consideration relates to plaintiff's allegations of total and permanent disability based upon the loss of industrial use of his legs. When determining an issue of total and permanent disability as

a result of industrial loss of use of the legs, one must be mindful of the legal principles set forth in Burke v Ontonagon Road Commission, 391 Mich 103; 214 NW2d 797 (1974) and MSA 17.237(361)(3)(g). In Burke, the Supreme Court set forth the following tests for determining whether a claimant has sustained a permanent and total loss of both legs as:

> There is permanent and industrial loss of both legs where interalia, "1. An employment-related injury in one or both legs causes pain or other condition that prevents the use of both legs in industry. 2. The use of one or both legs, whether or not injured, triggers an employment related injury or malady in any part of the body,, including one or both legs, that cause pain or other condition that prevents the use of both legs in industry."

The Michigan Supreme Court in Triplett v Chrysler Corporation, 393 Mich 518; 232 NW2d 168 (1975) further explained the rules set forth in Burke by stating:

> While the rule set forth in Burke is broadly worded, it was not the intention of this Court that the rule should be read to include those cases in which the laws of industrial use of the legs is caused by a generally debilitating disease, which affects bodily functions in much the same way and causes a general decline in those bodily functions.

Furthermore, the Supreme Court in Kandil v McLouth Steel Corp. 414 Mich 943 (1982), indicated that the Appeal Board erred in focusing on whether the plaintiff was able to use his legs to perform some reasonable employment, rather than whether plaintiff could reasonably use his legs in industry.

As such, we must consider whether plaintiff could "reasonably" use his legs in the industry per Burke, supra, instead of whether or not plaintiff was able to use his legs to perform some "reasonable employment" per DeGeer v DeGeer Farm equipment Company, 391 Mich 96; 214 NW2d 794 (1974) and Martin v Ford Motor Company 401 Mich 607; 258 NW2d 465 (1977).

Additionally as stated in Ettinger v Hooker Motor Freight, 117 Mich App 246; 323 NW2d 334, lv den, 417 Mich 939 (1983):

> Industrial use of both legs is the ability to actually make some use of both legs, to do some walking and some standing in the performance of a job, rather that the more limited ability to perform a job only while seatedin a wheelchair or while sitting otherwise

We also construe the meaning of permanent and total loss of industrial use of one's legs to be connected with debilitating pain associated primarily with the use of the legs, which is so severe as to make use of the legs in industry practically impossible (emphasis added). Paulson v Muskegon Heights Tile Company, 371 Mich 312; 123 NW2d 715 (1963).

As such, plaintiff must prove, by a preponderance of the evidence, Aquilina v General Motors Corp., 403 Mich 206; 267 NW2d 993 (1978), that his physical condition is such that his legs are incapable of being

reasonably used to perform work in the industry. When a person, such as we find in the case before us, is capable of reasonable use of his legs, there is no loss of industrial use of legs and therefore, not compensable under the provisions of MCLA 418.361 and Villa neuva v General Motors Corp. 116 Mich App 436; 323 NW2d 431 (1982), lv den 417 Mich 937 (1983), Stringer, and Kandil, supra[

In the facts before us, we find that plaintiff has failed to sustain his burden of proof in establishing a total and permanent disability as a result of a loss of industrial use of his legs. Plaintiff, by his own testimony, indicated that he would have continued in his last position with defendant Wismer & Becker, but for the walking of a block and a half to and from the parking lot. Plaintiff testified that the walk on the path caused him difficulty and pain. We, however, do not consider this to be a sufficient debilitating aspect of plaintiff's employment, which would render

him totally and permanently disabled as a result of loss of use of his legs. Rather, we find that plaintiff, over the years, performed numerous employment functions as either a steward, general foreman or in some other capacity for various defendants, which required him not only perform sedentary-type functions, but also limited standing and walking duties.

We note and are very much aware of the severe incident occurring in 1962 and also note that this limited plaintiff's ability to perform the general tasks of a millwright. Most notably in the latter employments with various defendants, plaintiff specifically informed his employers that he was unable to do any climbing. We, however, do not infer that plaintiff's inability to climb would render him unable to reasonably use his legs in the work force.

Moreover, plaintiff's left knee injury in 1979 was not the type of injury which rendered his legs totally useless. We find that this injury cause plaintiff temporary

problems with his legs (stiffness and pain), but did not disable him to the degree in which he was unable to use his legs in the work place.

We are unwilling to accept plaintiff's somewhat exaggerated statements that when he gets up to walk, his leg could buckle, which causes him to drop to the floor. We simply find this testimony inconsistent with plaintiff's other statement that since he has left his employ, he is able to swim in his backyard pool, grocery shop with his wife, drive and run errands and perform household tasks such as washing the dishes, sweeping, dusting the floors and cooking. Also, plaintiff indicated that when he gardens, he can sit, stand walk and get down on one knee. We find that these activities are contradictory to plaintiff's previous testimony, when he indicated that he is unable to utilize his legs in the work place because he is in such pain.

We also find these activities inconsistent

inconsistent with the opinions expressed by Dr. Horvath, who indicated during his 1977 exam and additionally, found no difference in his 1983 exam, that plaintiff was unable to climb or walk on uneven surfaces. He also opined that plaintiff would not be able to sustain prolonged standing for more than a few moments and that walking any distances would not be a good idea. Dr. Horvath did state though that plaintiff could perform a job sitting in a chair answering a telephone or perform clerical type work. Upon concluding both his examinations, Dr. Horvath opined that plaintiff had a "functional loss of his lower extremities."

However, when reviewing Dr. Horvath's testimony in conjunction with that of Dr. Campbell's, we are unwilling to accept Dr. Horvaths diagnosis and believe that there is a lack of reasonable inferences, which might otherwise allow us to render plaintiff totally and permanently disabled as a result of loss of industrial use of his legs.

Moreover, we note, as did defendant, that

Dr. Stern diagnosed plaintiff as suffering from hypertension and exogenous obesity. Dr. Stern acknowledged plaintiff's history of an irregular heartbeat and atrial fibrillation, which was attributed to his elevated high blood pressure. Plaintiff's blood work also revealed elevated triglycerides, which was indicative of arteriosclerotic process. Dr. Stern noted that plaintiff's obesity could contribute to the swelling in his lower extremities and that his consumption of alcoholic beverages could contribute to some of plaintiff's problems.

As such, when considering all these factors, we are unwilling to accept plaintiff's allegations of total and permanent disability. If we agreed with plaintiff's allegations, we believe that we would be basing our opinion on speculation, conjecture, guess and mere possibilities. Ash v Great Lakes Greyhound Lines, 337 Mich 362; 60 NW2wd 166 (1953).

We do, however, find that plaintiff is a skilled worker who is unable to return to his

skilled trade, although he continued to work as a millwright in a limited capacity. We do not find that plaintiff has sufficiently and totally recovered from his initial injury, which caused him to perform limited duties within the millwright area. Thus, we do render plaintiff partially disabled from his employment as a millwright and thus, he is entitled to a percentage of his wage loss.

We base our decision, in part, on plaintiff's testimony that he continued to be paid at the millwright wage even though he was not performing the general heavy labor task associated with millwright duties. Whether or not a question before use, rather, we simply view this as plaintiff being partially disabled from millwright work, which would entitle him to compensation benefits.

We must clarify, however, that we have not determined that plaintiff has completely recovered and would be able to return to skilled employment thus disallowing any benefits similar to that in Kaarto v Calumet

& Hecla, Inc, 367 Mich 128; 116 NW2d 225 (1962).

Moreover, we have not found that plaintiff's partial disability has cause him to return to unskilled employment, which would render him totally disabled from employment in which his injury occurred and thus, entitling him to 100 percent of any existing wage loss. Again, we base this on plaintiff's testimony that he received his regular millwright wage even while performing other than heavy labor duties in the employment for various defendants over the years.

We are basing our decision of partial disability on Section 301(1), which states, in pertinent part:

> Time of injury or date of injury as used in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions which resulted in the employee's disability or death.

We are not willing to accept defendant Wismer & Becker's allegations that plaintiff's last injury, the knocking of the knee against the motor, temporarily exacerbated plaintiff's knee symptoms and did not increase his underlying pathology. Rather, we find that plaintiff sustained a number of problems with his physical condition over the years and that whether or not the last knocking of the knee on the motor caused the problem is undeterminable.

As such, we find the language of Section 301(1) applicable in that plaintiff's partial disability cannot be attributable to one single event and thus, his last day of work for defendant Wismer & Becker applies.

Regarding the issue of the two year back rule, MCLA 381,(2); MSA 17.237(381) (2), we note that the issue raised regarding the obligation of the Second Injury Fund and the date of September 16, 1983, raised by plaintiff is hereby rendered moot based upon our decision supra. As such, both parties agreed that the application of the two year

back rule would be based upon plaintiff's application filed on December 10, 1984, and, thus, weekly benefits should be paid from a period beginning December 10, 1982.

Finally, counsel has raised the issue of dependency., Counsel has reference to the pertinent Supreme Court case of Day v Foote Memorial Hospital, 412 Mich 698; 316 NW2d 712 (1982), wherein the Court Struck down the presumptive dependency of a widow provisions set forth in the statute referenced supra. Additionally, for all non-conclusively presumed dependents". . .questions of dependency shall be determined in accordance with the fact, as the fact may appear at the time of the injury . . . ."

As such, our review of the record finds that plaintiff has been married for 35 years and has continuously lived with his wife the entire time. Plaintiff stated his wife was dependent upon him, however, he did not indicate whether or not his wife was ever employed and if she earned wages. We find that plaintiff's scant testimony of his wife

living with him for 35 years and was dependent upon him is not a basis in which we find plaintiff has proved, by a preponderance of the evidence, that his wife was a dependent. As such, we find that plaintiff has failed to meet the standards set forth in Day, supra, and the requirements of Section 353.

Dated and entered at lansing, Michigan this 23rd day of December A.D., 1991.

WORKERS" COMPENSATION APPEAL BOARD

/s/Patrick J. Fuller, Adjunct Member

Member Birch dissenting

I respectfully dissent from Member Fuller's decision regarding the total and permanent disability of plaintiff in this matter. The evidence is clear and convincing that plaintiff is totally and permanently disabled; the issue are asked to determine is whether the total and permanent disability has a relationship to the plaintiff's employment. I would remand this matter to

the Board of Magistrates for the determination of dependency pursuant to Pike v City of Wyoming, 431 Mich 989 (1988). In all other respects I am in agreement with my colleague.

The law concerning total and permanent disability is more than adequately set out by Member Fuller. While the law is cited accurately, it has not been applied correctly. Even Dr. Campbell, who is relied upon by the administrative law judge in denying benefits, finds that plaintiff is totally and permanently disabled. He would attribute plaintiff's disability to arteriosclerotic heart disease and peripheral neuritis to scoliosis. Using any of the standard enunciated above, plaintiff is not able to use his legs in any type of industrial setting. It is clear from the testimony that plaintiff could not even continue to walk a block and a half from his car to his place of employment. Plaintiff must now use a cane in order to ambulate.

To Accentuate the fact that plaintiff is

in fact totally and permanently disabled, we look at the testimony of Dr. Horvath, long known among practitioners, as a dedicated defense examiner. According to him, even from 1977, plaintiff was able to do little more than sit in a chair, answer the telephone and do clerical work. If even such a notorious skeptic as Dr. Horvath finds plaintiff unable to do any work whee it is necessary to use his legs, I must find that plaintiff has carried his burden of proof by a preponderance of the evidence. The standard of disability is not "totally useless"; the standard is whether a work-related injury or sequelae prevents the use of both legs in industry. Burke v Ontonagon Road Commission, 391 Mich 103 (1974).

It is conceded that plaintiff had arteriosclerosis and is in fact overweight. Dr. Campbellis correct in indicating that those problems had a limiting affect on plaintiff. However, before those problems had deteriorated to the point they were at

the time of Dr. Campbell's examination, plaintiff's degenerative artritis, caused by his initial injury, and aggravation caused by subsequent injuries, had brought plaintiff to the point where, because of pain and unreliability of his legs, he was no longer able to work. I can think of no situation in industry where a job is available that requires the use of the legs where the employee can only stand momentarily and walk for very short distances. I would find that it is plaintiff's employment which caused or aggravated his leg and knee problems to the point of disability.

As indicated above, the matter of dependency is always open to question. Day v W. A. Foote Memorial Hospital, 421 Mich 698 (1982) has required that all spousal dependents be proven. There is only one dependent contested by the defendant, plaintiff's wife. Contrary to my colleagues's writings, there are no standards set forth in day as to what is the proper quantum of evidence to prove dependency.

Since the Supreme Court has ruled in Pike, the issue of dependency is always one that may be revisited. I suggest that the parties return to the Board of Magistrates for a factual determination if they cannot stipulate to the dependency.

I would therefore affirm the administrative law judge and modify his decision to provide that plaintiff is entitled to a determination of total and permanent disability and would further remand this matter for a determination of dependency if the parties are unable to reach agreement

Dated and entered at Lansing Michigan, this 23rd day of December, A.D. 1991

WORKERS COMPENSATION APPEAL BOARD

/s/Kenneth A. Burch, Adjunct Member

PETERSON, CHAIRPERSON

I concur with Adjunct Member Fuller.

Dated and entered at lansing, Michigan this 23rd day of December, A.D. 1991

/s/ Craig R. Peterson, Chairperson

STATE OF MICHIGAN

COURT OF APPEALS

ROBERT CULP,

Plaintiff-Appellant

v

May 10,1994

WISMER & BECKER,

Defendant-Appellant Case Nos.

and 148406

MICHIGAN BOILER and THE 161286

SECOND INJURY FUND, et al. 1991 WCAB 480

Defendants-Appellees.

_____/

Before: Hood, P.J. and R.J.Danhof* and Jeanne Stempien**

PER CURIAM

In Docket No 148406, plaintiff appeals by leave granted from a decision by the Workers' Compensation Appeal Board (WCAB) modifying the decision of the hearing referee by finding partial disability. In Docket No. 161286, Defendant, Wismer & Becker (Wismer) *Former Court of Appeals Judge, sitting by assignment. **Circuit Judge sitting by assignment

appeal granted, after remand from the Michigan Supreme Court to this Court for consideration, from the WCAB decision to impose liability for plaintiff's disability upon it as plaintiff's last employer. We affirm, but remand for further proceedings.

Plaintiff worked as a millwright for numerous employers over the years. Although the job was considered skilled employment, it also required plaintiff to climb ladders, lift and carry heavy items and engage in generally strenuous labor. Plaintiff first sustained a serious injury to his legs and feet in 1962 and was off work for eighteen months, but returned and worked in millwright positions.

After a brief career selling real estate, plaintiff returned to millwright work in late 1977 and worked for various employers. Plaintiff last worked in a millwright position as a union steward for Wismer. On August 6, 1980 plaintiff struck his knee against a motor while performing an inspection. Although he lost no time from

work , plaintiff left the job in October 1980 because he could not walk one and one half blocks from the parking lot to the worksite.

Plaintiff's initial petition, which was received by the Bureau on December 10, 1982, asserted injury dates of summer 1962, January 9, 1976, June 21, 1979 and August 6, 1980, and claimed total and permanent disability due to industrial loss of use of both legs. An amended petition, filed in September 1983 alleged additional dates of injuries and named additional employers. By the date of trial, March 21, 185, 17 employers and the Second Injury Fund (total and permanent disability provisions) had been named as defendants.

in a decision mailed on October 16, 1985 the hearing referee found that plaintiff had established a personal injury when he struck his left knee in 1980 while working for Wismer and that he was totally disabled. The referee ordered Wismer to pay benefits at the weekly rate of $176. Although the opinion provided that he be entitled to benefits

obeginning on December 10, 1982, the decision sheet indicated that benefits were to commence on December 10, 1980 pursuant to MCLD 418.3812);MSA 17.237(381)(2).

Plaintiff and Wismer each appealed the decision. In a two to one decisions entered on December 23, 1991 and adjunct panel of the WCAB modified the referee's decison by finding that plaintiff was only partially disabled from his employment as a millwright and therefore entitle to a percentage of his wage loss .

The majority also concluded that plaintiff's partial disability could not b attributed to a single event and thus, pursuant to MCL 418,301(1); MSA 17,237(301)(1), his date of injury was the last day worked for Wismer.

Docket No. 148406

This Court's review of a decison by the WCAB is limited. Absent a showing of fraud, findings of fact by the WCAB are conclusive and may not be set aside if they are supported by evidence in the record. Const. of 1963, art 6 § 28; MCL 418,861;MSA

17.237(861). However, this Court may reverse a decision of the WCAB if the WCAB operated within the wrong legal framework or based its decision on erroneous legal reasoning. Flynn v General Motors Corp. 162 Mich App 511,513-514; 413 NW2d 444 (1987).

Plaintiff's first argument that there cannot be a finding of partial disability because MCL 418.361; MSA 17.237(361) "makes earnings after injury an element in a determination of partial disability" is completely without merit. Pursuant to MCL 418,361; MSA 17.237(361), an employer found liable for partial disability benefits is obligated to pay compensation equal to 80% of the difference between the employee's pre-injury average weekly wage and the amount the employee is able to earn after the injury. §361 is relevant only after the WCAB makes a finding that an employee is partially disables; however § 361 is irrelevant for a finding of partial disability.

Moreover, plaintiff's assertion that the calculation under § 361 could not be made

because he has not earned any wages since his last day worked at Wismer is equally without merit. In Sobotka v Chrysler Corp. (On Reh),(1993), 198 Mich App 455; 499 NW2d 777 (1993), lv granted 443 Mich 869 (1993), this Court held that a determination of partial disability must include a calculation of the proportionate impairment in the claimant's wage-earning capacity., The fact that the claimant may not have found post-injury employment is not controlling. Id., p462.[1]

The WCAB should have set a partial disability rate pursuant to §361 in light of its finding that he was partially disabled. Accordingly, this case is remanded to the WCAB so that the calculation required by §361 and Sobotka may be made.

Plaintiff also contends that the WCAB erred by holding that the benefits should commence on December 10, 1982. We agree. MCL 418.381(2); MSA 17.237(381)(2), provides:

> Except as provided in subsection (3), if any compensation is sought under this act, payment shall not be made for any

> period of time earlier than 2 years immediately preceding the date on which the employee filed an application for hearing with the bureau.

The Bureau received plaintiff's original petition on December 10, 1980.

Docket No. 161286

Wismer argues that the WCAB erred by imposing liability for plaintiff's partial disability upon them as his last employer pursuant to MCL 418,301(1); MSA 17.237(301)(!) provides in relevant part:

> Time of injury or date of injury as used in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subject to the conditions that resulted in the employee's disability or death.

The evidence showed that plaintiff suffered an initial injury in 1962 and various other injuries over the course of the years at different places of employment. The evidence

also showed that the work plaintiff performed after his initial injury aggravated his condition. Regarding application of §301(1), the WCAB majority stated:

> We are not willing to accept defendant Wismer & Becker's allegation that plaintiff's last injury, the knocking of the knee against the motor, tedmporarily exacerbated plaintiff's knee symptoms and did not increase his underlying pathology. Rather, we find that plaintiff sustained a number of problems with his physical condition over the years and that whether or not the last knocking of knee on the motor caused the problem is undeterminable.
>
> As such, we find the language of Section 301(1) applicable in that plaintiff's partial disability cannot be attributable to one single event and thus,his last day of work for defendant Wismer & Becker applies.

The evidence supported the WCAB's finding that plaintiff's work for Wismer aggravated

his condition and contributed to his disability, although the underlying cause was not determinable. Accordingly, the WCAB properly applied §301(1) in determining that plaintiff's date of injury was his last day of work for Wismer.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Robert J. Danhof

/s/ Jeanne Stempien

[1] Although full benefits must be paid if the claimant is found to be totally disabled in skilled employment, but only partially disabled with respect to other employment, id p462, the WCAB did not find that plaintiff was totally disabled in his employment as a millwright which is a skilled trade.

COURT OF APPEALS OF THE STATE OF MICHIGAN

ORDER

E. Thomas Fitzgerald
Presiding

Robert Culp v Wismer & Becker
Docket No. 148428

Marilyn Kelly
Kathleen Jansen
Judges

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

A true Copy entered and certified by Ella Williams, Chief Clerk on
Sep 3, 1992 /s/ Ella Williams
Chief Clerk

SEAL

COURT OF APPEALS

ORDER

Robert Culp v
Wismer & Becker
Docket # 148406

E. Thomas
Fitzgerald, J.
Presiding
Marlyn Kelly
Kathleen Jansen
Judges

The Court orders that the application for leave to appeal is GRANTED in part. The time for taking further steps in this appeal runs from the date of the Clerk's certification of this order. MCR 7.205(D)(3). This appeal is limited to the issues of whether the Workers' Compensation Appeal Board (WCAB) was required to calculate the proportionate extent of plaintiff's partial disability,. MCL 418.361;MSA 17.237(361), and whether the WCAB erred in applying the two-year back rule, MCL 418.381(2); MSA 17,237(361()2), and in ordering that plaintiffs benefits commence as of December 10, 1982. MCR 7.205(D)(4).

Regarding the issue of the calculation of the proportionate extent of plaintiff's partial disability, plaintiff is directed to specify the remedy he seeks.

A true copy entered and certified by Ella Williams, Chief Clerk on Sep 15 1992

/s/Ella Williams
Chief Cler

SEAL

IN THE MICHIGAN COURT OF APPEALS

ORDER

June 11, 1993

Re: Robert Culp v Wismer & Becker
Docket No. 148406 and 161286

Martin Doctoroff, Chief Judge, acting pursuant to MCR 7.211(E)(2), orders:

The motion to consolidate is GRANTED, and these appeals are CONSOLIDATED.

IN THE MICHIGAN COURT OF APPEALS

ORDER

February 12, 1993

Roman S. Gribbs
Presiding
Myron H. Wahls
Thomas S. Brennan
Judges

Re: Robert Culp v Wismer & Becker
Docket # 148406

The Court orders that the motion to strike arguments II and III of plaitiff-Appellant's brief is GRANTED.

A true copen entered and certified by Ella Williams, Chief Clerk

February 11, 1993 /s/ Ella Williams
Chief Clerk

SEAL

IN THE MICHIGAN COURT OF APPEALS

ORDER

Re: Robert Culp v Wismer & Becker
Docket No 161286

Martin M. Doctoroff, Chief Judge, acting pursuant to MCR 7.211(E)(2), orders:

The motion to strike is GRANTED and the brief filed by plaintiff on June 23, 1993 is STRICKEN. Plaintiff shall within 14 days of this order file a brief that does not contain the arguments I and III, which were contained in the June 23, 1993,. brief.

Order **Michigan Supreme Court**
Entered January 26, 1993 Lansing, Michigan

Michael F. Cavanagh
Chief Justice
Charles L. Levin
95045 James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P Griffin
Conrad L. Mallett, Jr.
Associate Justices

ROBERT CULP,
Defendant-Appellee,

v SC: 94867
COA: 148428
Wismer & Becker LC: WCAB
Defendant-Appellant,
and

MICHIGAN BOILER AND ENGINEERING COMPANY, and CONTINENTAL INSURANCE CO., et al.

Defendants-Appellees
_____/

On order of the Court, the application for leave to appeal is considere, and pursuant to MCR 7.302 F) 1), in lieu of granting leave to appeal, we REMAND the case to the Court of Appeals for consideration as on leave granted of the application for leave to appeal of defendant Wismer & Becker.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, Certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

SEAL January 26, 1993 /s/Corbin R. Davis
Clerk

Order **Michigan Supreme Court**

Entered January 26, 1993 Lansing, Michigan

Michael F. Cavanagh
Chief Justice
Charles L. Levin
James H. Brickley
Patricia J. Boyle
Dorothy Comstock Riley
Robert P Griffin
Conrad L. Mallett, Jr.
Associate Justices

95045

ROBERT CULP,
Plaintiff-Appellant,

v SC: 95045
COA: 148406
Wismer & Becker LC: Wcab
Defendant-Appellee,

and

MICHIGAN BOILER AND ENGINEERING COMPANY, and CONTINENTAL INSURANCE CO., et al.

Defendants-Appellees
_____/

On order of the Court, the delayed application for leave to appeal prior to decision by the Court of Appeals is considered and it is DENIED, because the Court is not persuaded that the questions presented should be reviewed by this Court before consideration by the Court of Appeals.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, Certify that the foregoing is a true and complete copy of order entered at the direction of Court.

SEAL January 26, 1993 /s/Corbin R. Davis
Clerk

ORDER Michigan Supreme Court
Entered: Nov. 30, 1994 Lansing, Michigan

99812 & (100), 99813 & (69)

ROBERT CULP,
Plaintiff-Appellant,
Cross-Appellee SC: 99812, 813
v COA: 148406; 161286
WISMER & BECKER, LC: WCAB
Defendant-Appellee,
Cross-Appellant
and
MICHIGAN BOILER & ENGINEERING
CO. THE SECOND INJURY FUND, et al.
Defendants-Appellees.
_____/

On order of the Court, the application for leave to appeal and the application for leave to appeal as cross-appellant are considered, and they are DENIED, because we are not persuaded that the questions presented should be review by this Court.

Griffin, J. would grant leave to appeals as to cross-appellant.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

SEAL November 30, 1994 /s/ Corbin R. Davis
Clerk

Excerpt from Brief in Opposition to Motion to Strike, Michigan Court of Appeals

ARGUMENT

PLAINTIFF-APPELLANT, APPELLEE IS ENTITLE TO A FULL AND COMPLETE PRESENTATION OF HIS CONTENTIONS TO THE COURT OF APPEALS AS A MATTER PROTECTED BY AUTHORITY OF THE EQUAL PROTECTION PROVISIONS OF THE STATE AND UNITED STATE'S CONSTITUTIONS

Article 1, Section 2 of the Michigan Constitution of 1963, states, in part:

> No person shall be denied the equal protection of the laws.

Amendment XIV, Section 1 of the Constitution of the United States states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.